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No. 97-615

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

TRUSERV CORPORATION, PETITIONER

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. DANIEL G. LUNGREN, ATTORNEY GENERAL, AND AS YOU SOW, RESPONDENTS

On Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case presents the Court with the opportunity to resolve substantial conflicts over the scope of preemption under the FHSA, an important statute that governs thousands of household products. Pet. 9-11, 19, 21. Review would also permit the Court to resolve conflicts over the preemptive effect of other closely related statutes and the applicability of the "general/specific" distinction employed by this Court in *Medtronic* to statutes other than the MDA. Pet. 11-14, 16-19.[1] Some 15 federal statutes expressly preempt state "labeling" requirements, so the issues presented are undeniably recurring as well as important to the proper administration of federal law, and the lower court's resolution of them was marred by serious error. Pet. 21-30.

California does its best to sow confusion about the scope of the holding below and create doubt about the extent of the conflicts in the lower courts. Try as it might, though, the State is unsuccessful in its efforts to explain away the disagreements in the lower courts, minimize the importance of the issues presented, or defend the indefensible logic of the Court of Appeal's decision.

A. The Issues Presented In This Case Are Neither "Narrow" Nor Identical To Those Raised in *Allenby*.

The State's brief repeatedly asserts that "the issue" in this case is "narrow" (Br. in Opp. ii, 2, 10, 17, 26) or even "peculiarly narrow" (*id.* at 10) and "not likely to arise again" because it has been definitively resolved by the federal and state courts in California (*id.* at 2, 10). Relatedly, the State suggests that this case is just a carbon copy of the Ninth Circuit's 1992 decision in *Allenby*, which this Court declined to review. Br. in Opp. 2, 6-7, 15, 26. Neither of the State's major themes is correct.

1. The issue presented in this case is not limited to "whether

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[1] The Court's grant of review in *Lewis* v. *Brunswick Corp.*, No. 97-288, a case involving Boat Safety Act preemption, reflects recognition of the need for clarification of preemption law. Although the pendency of *Lewis* suggests that this case should *at least* be held, plenary review would be more appropriate because of the differences between the cases. In *Lewis*, the court of appeals held that a federal decision *not* to require propeller guards preempts state-law claims.

a point of sale sign containing the language" mandated by Proposition 65 "*is a direction for use* and therefore * * * preempted by the FHSA." Br. in Opp. 10 (emphasis added). *One argument* TruServ will make if review is granted is that the Court of Appeal erred in refusing to give deference to the CPSC's eminently reasonable interpretation of the phrase "directions for use," which is found in an FHSA provision that also defines the term "label." See Pet. 26-27. But at least two other arguments for reversal in no way depend on an interpretation of "directions for use." *First*, the Court of Appeal erred in refusing to interpret the term "labeling," which the FHSA does *not* define, by reference to various federal statutes that define this term of art (and that do so in a way that plainly encompasses point-of-sale signs, regardless of whether such signs include "directions for use"). Pet. 28-29. *Second*, the obligation under Proposition 65 to provide warnings in a point-of-sale sign is preempted even if such a sign is not a "label" or "labeling" and even if the warnings are not "directions for use," because the FHSA's preemption of state "cautionary labeling requirements" includes any state requirement to provide warnings *that is premised upon a deficiency in the product's "label" or "labeling."* Pet. 25-26.

Equally mistaken is California's suggestion (Br. in Opp. 10) that the question whether Proposition 65 warnings in point-of-sale signs are preempted by the FHSA is unlikely to arise again. As we explained (Pet. 14), *Allenby*'s key holding — which the California Court of Appeal in this case rejected — is that FIFRA cases are binding in cases involving FHSA preemption because the preemptive scope of the two statutes is identical. That principle, in turn, would oblige the federal courts in the Ninth Circuit to follow a line of post-*Allenby* cases that the court below found it necessary to distinguish (Pet. App. 17a-21a), including *Taylor AG Indus.* v. *Pure-Gro*, 54 F.3d 555 (9th Cir. 1995), all of which held that state-imposed obligations to provide warnings in point-of-sale signs are preempted "labeling" requirements under FIFRA. See also *Industrial Truck Ass'n* v. *Henry*, 1997 WL 594619 (9th Cir. Sept. 29, 1997) (holding that OSHA preempts Proposition 65 warnings without applying "general/specific" framework of *Medtronic*). The federal and state courts are far apart in their analysis, and future litigation over this issue is inevitable.

2. The State repeatedly suggests that the decision in this case is nothing more than a carbon copy of the Ninth Circuit's decision in *Allenby* and that the arguments raised here were also raised in the unsuccessful certiorari petition in *Allenby*. Br. in Opp. 2, 6-7, 26. That argument is flawed at every turn.

Allenby predated both *Cipollone* and *Medtronic*. The Court of Appeal in this case also *expressly disagreed* with *Allenby* in several respects. See Pet. App. 12a n.9, 19a n.16. In addition, *Allenby* involved a declaratory judgment action raising a facial challenge to the FHSA's preemption provision. Pet. 15-16. This case, in contrast, is an enforcement action in which TruServ raised a preemption defense that, by its nature, embodies an *as-applied* challenge to Proposition 65. The two cases are far from identical.

Respondent is also wrong to suggest (Br. in Opp. 6-7) that our petition merely rehashes arguments that were made in the *Allenby* petition. Virtually all of the cases involved in the various conflicts we identify have been decided since *Allenby*. Indeed, several of these conflicts in the lower court decisions are directly attributable to ambiguities in *Cipollone* and *Medtronic* (see Pet. 13, 16-18). Similarly, the conflict over whether FHSA and FIFRA preemption are coextensive was created, in large measure, by the lower court's action in *expressly disagreeing* on this point with *Allenby* and with other decisions. Pet. 14; Pet. App. 19a n.16. Not one of these conflicts existed at the time of *Allenby*.

The *Allenby* petition argued only that the legislative history of FHSA demonstrates Congress's goal of ensuring uniformity of hazardous substances labeling, that warnings in point-of-sale signs are *impliedly* preempted, and that the Ninth Circuit erred in failing to consider the CPSC General Counsel's interpretation of the FHSA preemption provision in Advisory Opinion No. 312. No. 91-1957 Pet. 24-28. Although Advisory Opinion No. 312 was cited in the *Allenby* petition, the Ninth Circuit's decision made no mention of it and the State itself argued in opposing certiorari that it "was not part of the record" and thus could not properly be considered. No. 91-1957 Br. for Cal. Atty. Gen. in Opp. 16. It is thus untrue that "eight different judges" (including the trial and appellate judges in *Allenby*) have concluded that the CPSC's interpretation is "contrary to the language of the statute." Br. in Opp. 15.

B. The State's Efforts To Explain Away The Conflicts And Confusion In The Lower Courts Are Unsuccessful.

Multiple aspects of the Court of Appeal's decision implicate disagreements among the federal and state courts. See Pet. 9-12, 14, 17-19. In several respects the Court of Appeal's holding also depends on reasoning that is at odds with this Court's decisions in *Cipollone* and *Medtronic*. See Pet. 14-16, 20. The State's arguments for why these conflicts are either nonexistent or not implicated by the lower court's holding are utterly lacking in merit.

1. The State incorrectly asserts that the conflicts (see Pet. 9-12) in the FHSA and FIFRA cases relating to whether non-label warnings are preempted are "illusory." Br. in Opp. 17.

a. The cases involving FHSA preemption, the State argues, are distinguishable because "all were based on common law failure to warn claims that *directly challenged* the adequacy of the label." Br. in Opp. 17 (emphasis added). That is precisely our point: a failure to warn claim *"necessarily* challenge[s] the adequacy of the warnings provided *on the product's labeling or packaging."* *Papas* v. *Upjohn*, 985 F.2d 511, 519 (11th Cir.), cert. denied, 510 U.S. 913 (1993). If the State is suggesting that these cases are inapposite because the only failure to warn at issue was a failure to warn *through the product label*, that argument rests on a misreading of these cases. Every one of these cases involved a claim under state law for *failure to warn* (not *failure to label*). Warnings can be conveyed by many methods, not just in the product's "label" or "labeling." See Pet. 9. Nor does is matter, as the State maintains (Br. in Opp. 19), that the state requirements at issue in these FHSA cases were imposed by the common law instead of by statute. See Pet. 14-15 (explaining why this distinction is inconsistent with *Cipollone* and *Medtronic*).

b. The State fares no better in seeking to explain away the pervasive conflict in the FIFRA cases (Pet. 11-12). It acknowledges that numerous courts have held that FIFRA's preemption of state "labeling" requirements reaches common law duties to warn "outside the label," including specifically in point-of-sale signs. Br. in Opp. 20 & n.11. The State also concedes that "[a] long line of cases" have held that "common law failure to warn claims" are preempted in their entirety by FIFRA. *Id.* at 20 & n.9. The State

further agrees that another line of cases "under FIFRA and similar federal laws" — including the Second Circuit's *Jorling* decision — reaches precisely the opposite result. Br. in Opp. 21-22.[2] The only explanation offered for the "obvious and distinct" conflict between these two lines of cases is, once again, the fact that one line involves common law requirements whereas the other involves statutory requirements. That is a distinction without a difference.

Taking a page from the Court of Appeal (see Pet. App. 17a-19a & nn.16-17), the State maintains that FIFRA preemption cases are inapplicable to cases involving the FHSA because (1) FIFRA, unlike FHSA, *does* include a definition of "labeling"; and (2) "the EPA approves the actual label under FIFRA." Br. in Opp. 23-24. Although it is true that FIFRA contains a broad definition of "labeling," none of the courts that have held that FIFRA preempts non-label warnings has relied on that fact. Instead, those courts, following *Cipollone* (see Pet. 13), have reasoned that the imposition of a state non-label warning requirement is *necessarily* premised on a deficiency in the product's "label." Nor does the fact that EPA approves FIFRA labeling (but CPSC does not approve FHSA labeling) render the FIFRA cases inapposite. The absence of agency approval of labeling is irrelevant in this case because the toluene warnings were *specifically mandated* by federal statute and regulation. See Pet. 2-3.

2. We demonstrated (Pet. 14) that the Court of Appeal's decision is at odds with many decisions holding that FHSA and FIFRA preemption are coextensive. We also showed that the lower court's analysis is inconsistent with a number of post-*Medtronic* decisions that have refused to transplant the "general/specific" distinction to statutes other than the MDA. Pet. 17-19 & nn. 9-10. The State acknowledges the existence of these conflicts (Br. in Opp. 17, 19, 24), but argues that they are not decisive to the outcome here. That argument is wrong.

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[2] Indeed, the State adds several cases to the latter group that were not cited in our petition, thus showing that the conflict we identified is *even deeper*. Br. in Opp. 21-22. Respondent is wrong, however, to include *National Broiler Council* v. *Voss*, 44 F.3d 740, 748-49 (9th Cir. 1994) (per curiam). The cited portion of *Voss* involved severability.

The Court of Appeal's holding was plainly dependent on the *Medtronic* "general/specific" distinction. The court derived from *Medtronic* the principle that "courts should broadly interpret the preemption provision of federal statutes with limited applicability and narrowly interpret those statutes with general applicability" (Pet. App. 9a); and it relied on that principle not only in ruling that *Cipollone* was inapplicable (Pet. App. 12a-14a) but also in deciding to give a narrow construction to the preemption provision of the FHSA, which the court regarded as a "general statute" (*id.* at 13a, 15a). The court also relied on *Medtronic* in distinguishing cases decided under FIFRA. Pet. App. 18a. The Court of Appeal even relied on *Medtronic*'s "general/specific" distinction in narrowly construing the term "directions for use" in the FHSA. See Pet. App. 15a. Because the Court of Appeal's construction of that term formed the basis for its refusal to defer to the CPSC's interpretation of "directions for use," the *Medtronic* analysis was decisive in this aspect of the decision as well.

It is also wrong to say that the Court of Appeal's holding — in express disagreement with *Allenby* — that FIFRA and FHSA preemption are not coextensive "is not dispositive of this case." Br. in Opp. 24. The Court of Appeal relied on that conclusion as a basis for refusing to follow a long line of FIFRA cases under which TruServ would have prevailed. Pet. App. 17a-21a.

3. The petition also identified several ways in which the Court of Appeal's holding depends on reasoning that is at odds with this Court's decisions in *Cipollone* and *Medtronic*. See Pet. 14-15, 19-20. The State makes no attempt to reconcile the Court of Appeal's maxim of construction with *Medtronic*. And it offers only the barest rejoinder to our demonstration that the distinction between common law and statutory requirements is unsustainable after *Cipollone* and *Medtronic*. The State asserts (Br. in Opp. 25) that the meaning of "requirement" is not at issue in this case, but that is irrelevant to the validity of the common law/statutory distinction that underlies the decision below.

C. The Issues Presented Are Recurring And Important.

Other than its efforts to portray the questions presented as much narrower than they really are, the State has little to say in response to our detailed showing (Pet. 21-25) of importance. It

does not dispute the broad applicability of the FHSA, the frequency with which FHSA preemption issues are litigated, or the existence of many federal statutes that, like the FHSA, preempt state "requirements" relating to product "labeling." Neither does the State dispute that the decision below will seriously impair the FHSA preemption provision as well as undermine the CPSC's general authority to enforce the statute in California. Pet. 24-25.

The State does, however, seek to minimize the significance of Proposition 65 by pointing out that no other State has yet followed California's lead. But Massachusetts is currently considering adopting a statute patterned after Proposition 65, and various other States have considered doing so. See Pet. 24. Even if no State will ever adopt a provision patterned after Proposition 65, that would hardly render this case unworthy of the Court's attention.

Proposition 65 has had an "extraordinary impact" on "marketing in the United States." O'Reilly, *Stop The World, We Want Our Own Labels*, 18 U. Pa. J. Int'l Econ. L. 617, 632-34 (1997). By requiring the payment of "a twenty-five percent 'bounty' from the [fines recovered] * * * to anyone who sues and wins as a private enforcer," Proposition 65 has created a "mini-industry of bounty hunter enforcement" and forced manufacturers to settle even frivolous cases in order to avoid crippling liability. *Id.* at 634. The sheer volume of Proposition 65 complaints is enormous. See Woody, *Efforts to Control Prop 65 Litigation Are Heating Up*, The Recorder, at 1 (May 17, 1996) (noting that respondent As You Sow alone "has filed some thousand intent-to-sue notices since 1992" and is "racking up millions of dollars in fees by forcing companies to settle minor or worthless complaints").[3] Moreover,

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[3] Assembly Bill 3160, which was sponsored by the California Attorney General and which would have placed new limits on private enforcement actions under Proposition 65, was defeated in the California Assembly when it failed to muster the 2/3 vote required by Proposition 65 to amend that law. Based on its investigation, the Committee on Environmental Safety and Toxic Materials, which reported AB 3160 out favorably, found that various public interest "litigation mills" in California had misused Proposition 65 by "unabashedly" and relentlessly "pursuing * * * small businesses with bogus legal action or threats of action for the single purpose of extorting money." Bill Analysis, Assembly Committee on

armed with Proposition 65's threat of massive liability, public and private enforcers routinely have secured settlements (as in this case, see Pet. 5 & n.2, Pet. App. 33a-34a) calling for businesses with nationwide operations to alter the *labels* of their nationally distributed products to include Proposition 65 warnings.[4] The issues raised in this case thus are of national importance.

D. The Decision Below Is Manifestly Incorrect.

There is no reason to countenance these severe dislocations, because the decision below is demonstrably incorrect. The State's efforts to defend the decision are unavailing.

1. The State disputes our contention (Pet. 25-26) that any state warning requirement that is premised on a deficiency in the federally required "label" or "labeling" is a "cautionary * * * requirement" relating to "labeling" and thus expressly preempted by the FHSA. According to the State, this argument is "directly contrary to the express language of the statute" and amounts to a claim that "Congress has implicitly occupied the entire field of warnings." Br. in Opp. 9; see also *id.* at 11-12.

The statutory text, however, supports our argument. The FHSA preempts certain "cautionary labeling requirements." California assumes, without explanation, that a "cautionary labeling requirement" is a requirement to make cautionary statements *in* the product's "labeling." But as the vast majority of federal and state courts have held (see Pet. 9-12, 23 n.15), it is more plausible to read the phrase "cautionary labeling requirement" to include a state requirement to make cautionary statements *that is premised*

Environmental Safety and Toxic Materials, at 3 (Apr. 16, 1996).

[4] In consumer product cases, the practice has been to calculate the potential liability by multiplying the $2500 penalty not by the number of days but by the *total number of product units sold*. Cf. O'Reilly, 18 U. Pa. J. Int'l Econ. L. at 632 n.84. Under that formula, TruServ's potential liability would have been enormous: this case involved hundreds of thousands of units of approximately 160 different products sold at more than 350 True Value® Hardware stores in California.

on a defect in the product's "labeling."[5]

The State is also wrong to characterize this argument as one of expansive "field preemption." By its plain terms, the FHSA preemption provision is limited to state "cautionary labeling requirements" that (a) target the same risk as a federal requirement, (b) are not identical to that requirement, and (c) have not been exempted by the CPSC.[6]

2. The CPSC and the FDA have long endorsed a broad understanding of FHSA "labeling" that encompasses point-of-sale signs. See Pet. 28-29. Ignoring that settled regulatory interpretation, the State asserts (but fails to demonstrate) that the FHSA uses the terms "labeling" and "label" "interchangeably." Br. in Opp. 13-14. The State also claims that our argument for incorporation of "labeling" as a term of art under federal law is "futile" because a CPSC regulation defines "accompanying literature" narrowly "to include only literature that provides directions for use." *Id.* at 14. The pertinent CPSC regulation, however, does not define "accompanying literature" for all purposes but rather as that term is specifically and restrictively used in 15 U.S.C. § 1261(n). See 16 C.F.R. § 1500.3(c)(9).[7]

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[5] This interpretation finds substantial support in the text of the preemption provision (which indicates that a "cautionary labeling requirement" is something that can be "applicable to" not just the "packaging" of a hazardous substance but also the "substance" itself, see Pet. 26), in the FHSA's legislative history (Pet. 25-26), and in common sense (because it prevents the States from avoiding preemption through the simple expedient of requiring warnings in point-of-sale signs rather than in product labels). California does not answer any of these points.

[6] To our knowledge, California has never asked the CPSC to exempt Proposition 65 from preemption.

[7] The State asserts that Congress "narrowed" the FHSA preemption provision in 1976 and "specifically rejected the idea of imposing uniform national labeling requirements." Br. in Opp. 4-5 (citing S. Rep. No. 251). In fact, the primary purpose of the 1976 amendment was to create *uniformity* in the preemption clauses of four statutes; and the only change in the scope of FHSA preemption noted by the Committee was an

3. The State insists that the Court of Appeal was right to apply the exacting standard for facial challenges to TruServ's assertion of a preemption defense in this enforcement action. Br. in Opp. 25. That proposition is absurd. TruServ did not bring a lawsuit to try to invalidate Proposition 65, but *defended* itself against the Attorney General's assertion that *particular actions* constituted a punishable violation of that statute. That is not a facial challenge. See generally Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 236-42 (1994).[8]

4. At the end of the day, the State simply offers no good reason why Congress would have designed a preemption provision that nullifies state-imposed obligations to provide warnings in product labels but allows States to require the very same (or even more prominent) warnings in point-of-sale signs posted right next to the same products on the shelf. It offers no reason, and there is none, why point-of-sale signs are preempted by FHSA if they contain "directions for use" (as that term was narrowly understood by the Court of Appeal), but not if they lack directions for use. Such irrational distinctions should not be attributed to Congress.

This case warrants plenary review by this Court. Moreover, given the many federal statutes that preempt state "requirements" relating to product "labeling" (Pet. 22-23 & n.14), and the disregard of the CPSC's views in the decision below, the Court should at least invite the United States to express its views. In addition, and for reasons stated in the petition (at 21 n.13) and above (at note 1), this case should at least be held pending the disposition of the petition in No. 96-1405, *Smiths Industries* v. *Kernats*, and/or the decision in *Lewis* v. *Brunswick Corp.*, No. 97-288.

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expansion of FHSA preemption to accord preemptive effect to "regulations * * * used to determine when a hazardous substance * * * shall be banned." S. Rep. No. 251, at 11-12, 17, *reprinted in* 1976 U.S.C.C.A.N. at 1003-04, 1009; see Pet. 22, 29 n.18. The page of the Senate Report cited by California *endorses* the goal of uniformity while recognizing CPSC's authority to grant exemptions from preemption.

[8] Contrary to the State's suggestion (Br. in Opp. 8 n.4), TruServ's "de facto" labeling argument represents only one of several versions of petitioner's as-applied challenge in this case and has not been abandoned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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